JAMES H. McKENNEY

Brief of Defendant-Appellant for Appellee

Filed Dec. 13, 1897.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 173.

PHILIP LEVIS, APPELLANT,

vs.

CHARLES R. KENGLA, *et al.*

BRIEF FOR THE APPELLANT.

HENRY E. DAVIS,
H. B. MOULTON,
For the Appellant.

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I.

STATEMENT OF THE CASE.

This is an appeal from the Court of Appeals of the District of Columbia, in a suit in equity in the Supreme Court of the District of Columbia, by the appellant as complainant, against Charles R. Kengla in his own right and as guardian of the infant defendants, Edith Louise Kengla and Eunice Marie Kengla, the said infants being also made parties defendant. The original bill, filed March 29, 1893 (Rec., 105), was brought against George M. Kengla and Charles R. Kengla, and the infants named in the amended bill (Rec., 1) are the heirs at law of the original defendant, George M. Kengla. The original bill was answered by both defendants April 25, 1893 (Rec., 108); the amended bill was filed May 16, 1895 (Rec., 1), and answered June 17, 1895 (Rec., 6), by the defendant Charles R. Kengla in his own right, and June 27, 1895 (Rec., 9), by the same defendant as guardian. On November 19, 1895 (Rec., 10), a petition for leave to file

a further amendment to the bill was made, which further amendment was placed on file November 26, 1895 (Rec., 12), and on November 26, 1895 (Rec., 13), a decree was passed by the Supreme Court of the District of Columbia, refusing permission to make the further amendment, and dismissing the original and the amended bills. On appeal this action was affirmed by the Court of Appeals of the District of Columbia March 17, 1896 (Rec., 121), the opinion of the latter court being printed in the Record (p. 115).

The suit involves certain real estate situate in the County of Washington, District of Columbia, and known as portion of a tract of land called "Alliance." On October 29, 1875, to secure a note for $2,000 payable in three years after date to the order of one Clokey, with interest at the rate of 10 per cent. per annum, payable semi-annually, the appellant deeded the property in trust to one Dodge and one Darnielle (Rec., 106, 2); a copy of the note being in the Record (p. 16.) Afterwards and on May 13, 1876, the appellant borrowed a further sum of $300 of Charles R. and George M. Kengla, giving therefor his promissory note, payable one year after date, with interest at the rate of 10 per cent. per annum, and securing the same by a deed of trust to one Weaver (Rec., 105, 2); a copy of the latter note also being in the Record (p. 17).

Default having been made in the payment of the $300 note, the property was advertised for sale under the second deed of trust (Rec., 113), and on October 29, 1877, pursuant to the terms of the advertisement, the property was sold at public auction (Rec., 106, 2, 3). The property was bid in by the Kenglas, but was not conveyed to them by the trustee Weaver until January 17, 1878 (Rec., 98–9). The Kenglas bought the property for the sum of $1,000 subject to the prior deed of trust to secure the $2,000, as appears by the testimony and the deed of the trustee Weaver. On January 18, 1878,

the property was released from the operation of the first deed of trust (Rec., 22–3), although, as appears by the terms of the note for $2,000 secured by that deed of trust, the said note was not due until the following October, or, allowing grace, the first day of November. A paper offered in evidence and purporting to be the report of the trustee Weaver, who sold under this second trust (Rec., 15), purports to show that of the $1,000 bid by the Kenglas at the sale the sum of $413.73 was "paid on interest" on account of the first note, although the interest then due on that note was a fraction over $401.

The appellant charges in his original and amended bills that at the time the property was offered for sale under the second deed of trust there was not present any one not interested in the premises, and that the bid of the Kenglas for $1,000, subject to the first deed of trust, was the only bid made; that he protested against the sale under the circumstances; that the Kenglas then and there agreed, in advance of the sale, that if he would permit the form of sale to be gone through they would take the property, satisfy themselves out of it for their indebtedness, and hold the remainder for the appellant's benefit, and either reconvey the whole of it to him on the payment of their indebtedness, or so much of it as might be left after satisfaction by them of their indebtedness, together with costs, etc.; that upon such agreement being made, a sale in form was had, and the property afterwards conveyed to the Kenglas; that, in 1879, the Kenglas sold to one Hume a portion of the property for the sum of $2,780; and that at the time of the filing of the original bill the Kenglas were about to dispose of the remainder of the property, as though they were the owners thereof (Rec., 2–4). The appellant accordingly prayed for an accounting in respect of his indebtedness under the two deeds of trust; for a reconveyance of the un-

sold portion of the property upon his satisfying his indebtedness; for an injunction, and for general relief.

As already stated, the defendants to the original bill were the two Kenglas; but, one of them having died, his heirs-at-law, the two minor defendants, were made parties in his stead. The defense is, as set out in the answer to the original bill (Rec., 109, 110), that at the time of the sale the Kenglas were the holders of the note for $2,000 as well as the one for $300; that the sale in October, 1877, was in good faith and in strict compliance with the requirements of the second deed of trust; that no objection was made by the appellant to the sale before it was accomplished, and that it was only after the sale that the appellant informed them that he believed he could obtain a purchaser for the property at a greater price than that for which it had been sold, and that they gave the appellant an indulgence of two weeks within which to find a purchaser at an increased price; and that the appellant failing, after effort, to secure such purchaser, they obtained a deed from the trustee and thereafter heard nothing further from the appellant in regard to the matter until the filing of the bill.

In connection with this defense on the facts, the further defenses of the Statute of Frauds and *laches* were relied upon.

II.

ASSIGNMENTS OF ERROR.

The court below erred:

1. In holding the appellant barred by the Statute of Frauds.

2. In holding the defendant guilty of laches.

3. In dismissing the original and amended bills.

4. In not granting the appellant the relief prayed by him.

III.

ARGUMENT.

1. On the law.

(*a.*) It was contended on the hearing below that any supposed right of action of the appellant is barred by the Statute of Frauds. This statute has no place in the case, as, if the facts be in accordance with the version of the appellant, the Kenglas became, by implication or construction of law, trustees *ex maleficio* for the appellant. This takes the case out of the statute.

Seichrist's App., 66 Pa. St., 237.
Baier *vs.* Berberich, 6 Mo. App., 537.
Turner *vs.* King, 2 Ired. (N. C.) Eq., 132.
Mulholland *vs.* York, 82 N. C., 510.
Tankard *vs.* Tankard, 84 N. C., 286.
Smiley *vs.* Pierce, 98 N. C., 185.
Arnold *vs.* Cord, 16 Ind., 177.
Harris *vs.* McIntyre, 118 Ill., 275.
Sandfoss *vs.* Jones, 35 Cal., 481.
Cameron *vs.* Ward, 8 Ga., 245.
Robertson *vs.* Robertson, 9 Watts, 32.

In dealing with this question, the learned court below in its opinion (Rec., 119), says:

"But apart from the disclosures of the testimony and the inherent probabilities of the situation, the alleged agreement set up by the complainant as the basis of his claim, if any such agreement was ever made, could not be enforced by a court of equity in the face of the direct and positive prohibition of the statute of frauds; and certainly no case could well be presented more proper for the application and enforcement of that statute. Whether the alleged agreement was an agreement to reconvey in a certain contingency, as stated in the original bill, or an agreement to hold the property in trust for the use and benefit of the complainant and thereafter to reconvey, as stated in the amended bill, it was equally obnoxious to the statute of frauds, as an

agreement relating to lands which was not reduced to writing and signed by the party to be charged therewith."

The obvious error in this statement is in the fact that it assumes the agreement set up by the appellant not to have been made in fact until after the sale had been effected. It may be admitted, for the sake of argument, that if there were no agreement between the appellant and the Kenglas until after their rights had attached by their purchase at the sale, the Statute of Frauds might be applicable. But such is not this case, which is that the agreement was made before the sale, and the appellant permitted the sale because of the agreement, and the Kenglas thereby became the holders of the land, and their interest therein as purchasers attached, under conditions out of which the law in case of breach of such conditions raises the trust *ex maleficio.* While not a strict resulting trust, which is the only form of trust with which the court below deals in contradistinction to the trust by express agreement, it is a well-recognized form of trust to which the statute has no application, as is adjudged by the cases above cited.

Another feature of the case which is ignored by the court below is that at the time of the agreement relied upon as creating the trust on the part of the Kenglas, the appellant was possessed of an existing interest to be preserved, and which could sustain such an agreement as is set up. Whenever this feature is present, the Statute of Frauds cannot be availed of to defeat the agreement; and indeed we might go so far as to say that the existence of such an interest is one of the features recognized by the courts as justifying, if not indispensable to the putting out of consideration the Statute of Frauds.

This is recognized in the case of Howland *vs.* Blake, 97 U. S., 624, cited in its opinion by the court below. In that

case this court, referring to the agreement alleged to have been made by the defendants, and the question whether in fact such an agreement was made, points out (p. 628) that—

"Unless the equity of redemption of Howland was kept alive by the alleged agreement with Taylor, he had no interest which could sustain a parol agreement by the defendants to buy the property for his benefit and to convey to him when required."

The converse of this necessarily is true, viz., that where an interest exists which can sustain a parol agreement, such agreement will be enforced.

Similarly, in Robertson *vs.* Robertson, 9 Watts, 32, the court (p. 34) points out that the *mala fides* from which a trust results by operation of law depends in every case upon there being in the case more fraud than what is implied in every breach of contract, and among the other circumstances besides the refusal to perform the contract which will induce the court to hold the purchaser a trustee, is mentioned a previous interest in the land in the person alleging the trust. So, too, in Kinard *vs.* Hiers, 3 Richardson (S. C.), Equity, 423, where the plaintiff having an equitable interest in land of which he was in possession, and which was about to be sold at a judicial sale, agreed by parol to the purchase of the land by the defendant for the benefit of plaintiff's wife and children, and the defendant purchased the land and then refused to comply with his agreement, the purchaser was held a trustee; and in Von Trotha *vs.* Bamberger, 15 Col., 10, the court holds that some such feature as a subsisting valuable interest in the premises is essential to the establishment of a trust *ex maleficio*. The substance of the court's holding on this point is accurately stated in the sixth paragraph of the syllabus, which is as follows:

"Where the statute of frauds prevails, a mere oral promise to reduce to writing a verbal agreement declaring a trust in

land, and the breach thereof, are not admissible to establish such trust, except in connection with other evidence tending to show fraudulent conduct in the acquisition of the title by the party holding it; but, when the existence of fraud is thus shown, equity will declare the party thus acquiring and holding the title a trustee *ex maleficio* upon the terms of the dishonored verbal agreement, or other equitable terms, for the benefit of a person having a subsisting valuable interest in the premises."

In the case at bar, the plaintiff had at the time of the making of the agreement relied upon a subsisting equitable interest in the property, in possession of which he was; and this subsisting interest was the subject of protection by the appellant in making the agreement, and assenting to the sale without contest. This almost alone is sufficient to raise the trust *ex maleficio;* but the case is much stronger, in that the testimony of other witnesses, notably Purcell, present at the sale, and the subsequent conduct of the parties, taken in connection with the fact admitted by the defendants, that there was some bargain in the premises, show clearly that the defendants were not taking unqualified title, and that some right as to the preservation of his interest was accorded the appellant.

The only escape from the appellant's contention in the premises would seem to be, therefore, in the outright denial by this court of the doctrine of the trust *ex maleficio.*

(*b.*) It was further contended that the appellant is barred of his remedy by laches.

Laches is such neglect or omission to assert a right as, taken in conjunction with lapse of time more or less great and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.

12 Am. & Eng. Enc. of Law, 533, and authorities cited.

Length of time alone is not a test of laches.

Paschall *vs.* Hinderer, 28 Oh. St., 568, 580.
Aylett's Executor *vs.* King, 11 Leigh, 486, 491.
Harris *vs.* McIntyre, *ubi supra.*

Where the defendant's rights have not been prejudiced by the delay, the material facts in the case sufficiently established, and the controversy not embarrassed by the claims of third persons, or by conflicting interests, lapse of time constitutes no ground for refusing relief in equity, and within what time a claim for relief will be barred depends upon the peculiar circumstances of the case, and these are always open to examination.

12 Am. & Eng. Enc. of Law, 542, Note.

"Nobody ought to be estopped from averring the truth or asserting a just demand, unless, by his acts or words or neglect, his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something or to abstain from doing something by reason of what he has said or done or omitted to say or do."

Per JAMES, L. J., in *ex parte* Adamson, L. R., 8 Ch. Div., 807, 817.

And, manifestly, where a question of duty to act is presented, and that duty is on the side of the party asserting laches, rather than on the side of the party against whom it is asserted, the latter cannot be barred.

This case wholly lacks the essential ingredient of prejudice caused to the parties asserting the laches. The outline facts of the case are that there were two loans secured upon certain real estate. Under the deed securing the second loan there was a sale, and the property was bought in by

the persons lending the money, subject to the first loan. They bought in the note representing the first loan, and were the owners thereof at the time of the conveyance in accordance with the sale, if, indeed, they did not make that loan itself. They have since remained in possession of the property, which has greatly increased in value; so that, although they may have paid taxes and other expenses in connection with the property, there remains a sufficient value to repay them all their claims of what kind soever and leave a most substantial surplus; and, in addition, whatever duty there was to act was on the side of the parties sought to be charged, and the original bill was filed at a time when both of those parties were living, and there was and could be no room for the suggestion of loss of evidence so far as they were concerned.

What the court below says, in its opinion (Rec., 120), on the subject of laches, ignores the point last suggested, viz, that whatever duty there was to act in the premises was on the side of the parties to be charged, and the original bill was filed at a time when both of those parties were living. If the conditions were such as possibly to raise a trust *ex maleficio*, the very nature of that trust made it incumbent upon the Kenglas, in order to avoid the imputation of wrongdoing, to do that which they undertook to do, and which was something not passive but active, viz, to hold and deal with the property as though it were in equity the property of the appellant. Assuming the facts to be as contended by the appellant, it is clear that by the terms of the agreement the Kenglas undertook to be the trustees for the appellant, and it is beside the case to say that the appellant's mere inaction could absolve them from their obligations in the premises.

2. This brings us to a consideration of the facts of the case.

Apart from the testimony of the appellant, the defendant Charles K. Kengla, who was the only one of the defendants to testify, admitted that the appellant objected to the sale, and that an agreement was had giving the appellant time. The defendant says that he told the appellant that all the defendants wanted was their money (p. 85); that they did not want anything but what was right, and that to show him that they did not want anything more they gave him time to sell the property, and if he got more for it, all over it he could have (p. 81). It is true that the defendant said that the agreement was that the appellant should have two weeks, but this is entirely inconsistent with the conduct of the defendant, as shown below, and the testimony of the witnesses Edward Brooke and Purcell (pp. 51–2, 61–70).

Edward Brooke says that he heard Robert Kengla say that all that he wanted was to get what belonged to him out of the property; that he did not want any more out of the property than belonged to him (p. 51); that all he wanted was to get his money out of the property (p. 52).

Purcell says that the defendants, or one of them, said to him that they did not desire the land, they only wanted their money out of it (p. 62), that "they only wanted their money out of it and the rest could go to the benefit of this man Levis" (p. 65), and that for some time after the sale the Kenglas held out to him a hope to get money due him from the appellant, and made statements involving the clear admission that there was an arrangement or agreement between themselves and the appellant wholly consistent with the appellant's claim and inconsistent with the story of the defendant; and that his talks with the Kenglas on the subject were as late as two, three, or fours years, or perhaps more, after the transaction (p. 69), if not as late as 1889 (p. 64).

But by far the most convincing feature of the case is the conduct of the parties.

The sale was made subject to the prior "trust" for $2,000. The advertisement so announced (Rec., p. 113), and the answer to the original bill admits the fact (*Id.*, 109). This meant that the purchasers assumed the payment of the entire indebtedness secured by that trust. Yet, when the trustee made settlement on account of the sale, he applied part of the purchase-money—nearer one-half than one-third—towards the $2,000 indebtedness (Rec., 15). The sum thus applied the defendants accepted the benefit of, and they never returned or offered to return it to the appellant.

Moreover, the defendants never returned to the appellant either of his notes. When the original bill was filed, and even until the testimony was taken, these notes were in the possession or control of the defendants (Rec., 18–19). The release of the $2,000 trust, as already pointed out, states that the note secured by it was cancelled by the trustees by direction of the Kenglas; and the original answer states that it was cancelled by the trustees (Rec., 109). Unless there was an agreement, such as the appellant alleges, why should the Kenglas have taken and retained more than one-third of the purchase-money, to which the appellant was clearly entitled? And why should they have retained both the $300 and $2,000 notes? Of these, the former was never cancelled (Rec., 19), and it is not pretended that the appellant ever knew of the cancellation of the latter until after this suit was begun, or that he ever knew of the trustee's account (Rec., 18).

In addition, the amount applied on account of the $2,000 note, namely, $413.73, was by no calculation and on no conceivable pretense due at the time. The note was dated October 29, 1875, and bore interest at the rate of ten per cent. per annum. On October 29, 1877, the day of pretended

settlement by the trustee, but two years' interest, or $401, could possibly be claimed as due. The entry in the trustee's memorandum (Rec., 15) of this item is: "By balance paid Levis; this balance paid *on interest* of 1st note for order of Levis—$413.73." It cannot, therefore, now be contended that it purported to be applied on any other account, especially as the trustee's memorandum shows that all taxes and other expenses were fully paid out of the purchase-money.

Two most pertinent questions force themselves upon the mind: 1, if the Kenglas *bona-fide* bought the property subject to the $2,000 incumbrance, why should they have applied any part of the purchase-money to that incumbrance? and 2, why, in any event, should they have taken more than enough to meet the interest thereon?

Neither of these questions can be answered except upon the hypothesis of the appellant's contention, namely, that the Kenglas were making good their agreement and statement that all they wanted was their money, and that when they got it the appellant should, as far as possible, be revested with his rights.

Another significant fact in the conduct of the parties is that the appellant testifies that Robert Kengla told him that he might sell the property by paying $1,000 in cash and the remainder in one and two years, and pay him, Kengla, just what was due him, the cost of sale and amount of the notes (p. 38). Kengla does not deny this. The fact is most significant in showing that the appellant was dealing with Kengla on the hypothesis of a sale of the whole property and for a sum which would enable him to pay off the Kenglas and have a surplus left. Besides, the appellant mentioned one Triplett as a possible purchaser, and Kengla admits that he called on Triplett on the subject after hav-

ing allowed the matter between himself and the appellant "to run along for awhile" after the expiration of the two weeks (pp. 81, 87).

Again, as showing the continued recognition of the appellant's rights by the Kenglas, they proposed to convey those rights in such a way that they would enure to the benefit of the appellant's wife and children to the exclusion of his creditors (pp. 31–2). Robert Kengla denies this (p. 89), but Purcell says that Robert Kengla told him that he wanted the appellant *and his family* to have the benefit of the proceeds of the property over the indebtedness (p. 62); the impression made upon him was that the Kenglas, in this whole transaction, were standing between the appellant and himself, Purcell, and other creditors, were acting as protective to the appellant and preventing any of the other parties from getting a lien on the property (pp. 63–4); that if the property was sold for a greater price than the money that they had in it the appellant or *his family* should have the benefit of it (p. 70).

This is strongly confirmatory of what the appellant says about the proposed conveyance for his wife and children.

Much reliance is had by the defendants upon the fact that on May 26, 1879, they sold to one Hume a portion of the land in controversy, and that the appellant then raised no question such as is now raised as to the title and his alleged rights in the premises.

In his amended bill the appellant deals with this matter in the alternative, alleging that the amount realized was sufficient to pay his indebtedness, or, if not, that he was ready to pay the difference due. In his testimony (p. 41), he says that he understood that "Kengla had sold part of it but had not got quite what I owed him."

If the appellant so understood, he understood aright. His account stood, in May, 1879, as follows:

Second note and interest, October 29, 1877, as per trustee's account	$343.75
Expenses of sale and taxes paid, as per same	242.52
First note and interest from October 29, 1875	2,400.00
Interest on two notes ($2,300) from October, 1877, to May, 1879, @ 10%	364.16
Total	$3,351.43
Amount of Hume sale	2,756.89
Balance due	$594.54

And this does not take into account whatever taxes and other charges the defendants may in the meanwhile have paid.

While, therefore, the appellant may have heard of the Hume sale shortly after it was made, he was not entitled, under his agreement, to a settlement with the defendants, as they were not yet paid out. And the appellant says, in his testimony, that the reason that he never redeemed the property was because he had not the means to do so (pp. 33, 37), and that until the bringing of his suit he was not advised by any one that there was any necessity for him to make any application to the defendants with reference to paying the balance due them until such time as he was prepared to pay (p. 37).

It remains only to consider the inadequacy of price.

The property is valued at the time of the sale by the witnesses at various sums, reaching as high as $12,000 and upwards. The assessment for taxes, put in evidence (p. 74), should be conclusive on this point. The amount of the assessment is ($4,840+$800) $5,640. Assuming that this is at the recognized maximum of two-thirds of the real

value, the latter would be $8,460. But county property has usually been assessed at about one-half the real value, and this would make the latter $11,280. And this is undoubtedly nearer the fact, as assessments were notoriously low throughout the District at the time of the transaction.

Respectfully submitted,

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H. B. MOULTON,
For the Appellant.